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THE ORIGINAL PACKAGE QUESTION RESURRECTED UNDER THE PURE FOOD LAW.

It was many years after the original package case was decided in Brown v. Maryland, 12 Wheat. 19, before conflicting decision between federal courts of original jurisdiction and state courts was allayed by the federal Supreme Court practically adopting the view of the latter in holdings of the type of that shown in Austin v. Tennessee, 179 U. S. 343.

The federal courts of primary jurisdiction seemed then, as some of them seem now, unable to get away from the concept, that almost any interference by the state with the government in its revenue or its authority under the interstate commerce clause, however good faith regulation of trade under police power there might be, was unlawful.

Thus they read the opinion of Chief Justice Marshall in Brown v. Maryland, while his successors on the bench of the court in which it was delivered, appeared to be anxious to restrict the principle declared to its narrowest limits.

Thus in the Austin case, which was decided by a majority of five to four, Justice Brown says: "The whole law upon the subject of original packages is based upon a decision of this court in Brown v. Maryland, 12 Wheat. 419, in which a statute of Maryland requiring all importers of foreign articles by 'bale or package,' or of intoxicating liquors and other persons selling the same 'by wholesale, bale or package, hogshead, barrel or tierce' to take out a license was held to be repugnant to that provision of the Constitution forbidding states from laying a duty upon imports, as well as to that declaring that Congress shall have power to regulate commerce with foreign nations."

It was said that: "Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries."

Justice Harlan, in May v. New Orleans, 178 U. S. 496, pointed out how destructively to the states the protection declared by the case of Brown v. Maryland would work, if foreign shipper and domestic buyer could determine for themselves what size, howsoever infinitesimal, should constitute an original package, which decision was also dissented from by the same minority as in the Austin case.

In the Austin case it was said by Justice Brown that: "The case under consideration is really the first one presenting to this court distinctly the question whether, in holding that the state cannot prohibit the sale in its original package of an article brought from another state, the size of the package is material, although some of the expressions in the License cases seem to foreshadow the consequences likely to result" from holding that it is not.

Further on he says: "The real question in this case is whether the size in which the importation is actually made is to govern, or the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country."

If this conclusion can be arrived at as to the inviolability of the authority of the government as to imports from a foreign country, so much the more it seems to us may it be claimed applicable to articles in interstate commerce. Constitutional intent was not to be extended so that foreigners and citizens in collusion might interfere with the welfare of states, and it presumed, that citizens of states *inter sese* would not, as a mass, desire so to do.

In the Austin case, therefore, it was ruled that, where cigarettes were imported in paper packages of three inches in length and one and one-half in width, containing ten cigarettes, unboxed and thrown loosely in baskets, such paper parcels were not original packages within the meaning of the law.

Now comes a case decided by Supreme Court of Nebraska, in which it was claimed that the pure food laws of that state did not apply to the sale of articles of interstate commerce, in original packages, because that subject is covered by the national pure food law. Ex parte Agnew, 131 N. W. 817.

The answer of the court was that the articles, which the state law applied to, were those only, which were to be sold after the breaking of bulk and their entry into the commerce of the state.

If this is a good answer, then, of course, the question of whether or not the state statute reached original packages in the commercial sense was the only one involved.

The facts of the case show that the National Biscuit Company, with its factories in New York and Chicago shipped its product in small packages to be sold at a retail price of five cents a package. These packages were in larger receptacles containing each one dozen of the smaller ones and these were placed in yet larger bundles to points of distribution in various states. The state law was claimed to have been violated in selling one of the five-cent packages in that it was "misbranded," that is to say, it was not stated on the package what was the "net weight or measure of the contents of the package."

In Austin v. Tennessee it was said as to packages of cigarettes that: "The consequences of our adoption of defendant's contention would be far-reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the state and import it in minute quantities."

In the National Biscuit Company's case the packages were not even put into a receptacle loosely, as in the cigarette case, but it was necessary to break bulk to sell a five-cent package, and the court might have disposed of the question upon that fact alone.

In the Biscuit Company case there was no unusual shipment in an attempt to get itself under the principle in Brown v. Maryland, but the real question involved was whether these packages were to be deemed units under the national pure food law or part of the mass to which it applied.

It certainly seems that, if lard or flour were shipped in bulk, the retail dealer could not package it in small quantities and sell without properly branding as to weight.

If that is true, why should a similar packaging by the manufacturer not come under state regulation, if the packaging does not convert the units into original packages?

The attempt in this case to evade the state law is interesting only as a sort of revival of the old controversy in an attempt at a new setting.

NOTES OF IMPORTANT DECISIONS

COMMERCE—DELIVERY TO ANOTHER CARRIER AT TERMINUS, WITHIN STATE, AS AFFECTING INTRASTATE RATES.—The question in the case of Railroad Commission of Ohio v. Worthington, 187 Fed. 965, decided by Sixth Circuit Court of Appeals, seemed too important to have received the scant treatment it did.

The opinion of the court was rendered in a case in which the receiver of a railroad claimed that the Ohio Railroad Commission had no jurisdiction over rates charged for coal from Ohio points to certain ports on Lake Erie where the coal was intended for lake transportation, because for such transportation the railroad was required to deliver the coal into vessels provided to receive it "properly distributed in their holds and the cargo properly trimmed for its further transportation to the ports of other states."

The commission had ordered reduction of rate "per ton f. o. b. vessel," and the federal court held that the loading on the vessel, distibuting and trimming the cargo were "included in the service for which the commission fixed the rate of 70 cents per ton."

This seems, however, a violent assumption, because it does not appear that it cost any more for the railroad to deliver in this way than in any other way, or that it, rather than the vessels, furnished the facilities for such a delivery. The inference rather is the other way and that the commission took notice of a prevalent custom of delivery for lake transportation, as the rate for other deliveries was actually higher than for f. o. b. vessel deliveries. The railroad thus escaped warehousing the coal or from being kept out of its cars until unloaded.

The opinion says: It (delivering f. o. b. vessel) was a service, which, if the transportation had been ended by a delivery on its own docks or into its own warehouses, would have been required to be performed by the subsequent carrier. Thus it participated in making the connection for the continuous transportation of the coal from the mines to its ultimate destination at the Upper Lake ports."

It is a little difficult to keep patience with what looks like assumption in the twisting from its intent the order of the commission.

It is easy to be gathered that there was lake transportation for coal from one port to another, and whether the port of shipment and the port of destination were in the same state was not inquired into. The facilities for loading, distribution and cargo trimming were a convenience to the vessels, and also, a convenience to the intrastate carrier. It is evident the commission thought it was relieving the railroad from a burden instead of imposing on it the duty and risk of keeping the goods after transportation had ended.

To illustrate it may be asked, whether or not the commission could have required the railroad to transport coal from an Ohio point to a port in Ohio on Lake Erie for the less rate where delivery was to be f. o. b. vessel, rather than for the higher rate the road was allowed to charge when there was to be the usual delivery to another carrier. If it could it would only be, because, its responsibility as a warehouseman ceasing, there was reason for this difference.

Here it appears, that the railroad's service is independent of that of the vessel. The latter is not a connecting carrier. Into its holds coal may be placed for any port in Ohio on the lake east or west of Cleveland as the case may be, the same as for "Upper Lake ports." The plan has nothing but an incidental relation to interstate traffic, applying no more, nor less, to foreign than domestic ports. If the Ohio commission had endeavored to take away from interstate commerce the convenience afforded, instead of calling it a burden imposed, there would seem to be a clearer right for the federal court's interference, than was presented.

THE INITIATIVE, REFERENDUM, AND RECALL.

The Initiative and Referendum.—The admirable article under the above heading from the pen of Mr. D. C. Lewis,[1] in the Central Law Journal, as to what constitutes a republican form of government and similar discussions by Mr. Glenway Maxon,[2] and Mr. D. C. Allen,[3] supported as they are by editorial notes and comments in that Journal, as well as indirectly, by an editorial on "The Flexibility of the Law,"[4] leave but little to be desired on the question at issue, to-wit: the constitutionality of the above provisions when applied to the regulation of the affairs of the state at large.

Oregon, passing on the initiative and referendum features, has held those features valid upon the ground that they did not destroy the representative character of its state government, that the people "had simply reserved to themselves a larger share of legislative power."[5] And California, in so far as concerns her municipalities, held that such features were not in contravention of the Constitution of that state, nor of Sect. 4, of Art. 4, of the United States Constitution, respecting the guaranty to each state of a republican form of government, and to sustain this theory, great and ultimate reliance was placed upon the usage in the four New England States at the time the United States Constitution was adopted, which permitted the

(1) Vol. 72, page 169.
(2) Vol. 72, page 378.
(3) Vol. 69, page 148.
(4) Vol. 72, page 165.
(5) Kadderly v. City of Portland, 44 Or. 118.

local communities in those states to govern themselves by that plan.[6]

What was that plan? "The General Court made up of the representatives from the towns admitted freemen, granted land to settlers, appointed committees to lay out new plantations, and made church laws as well. The representation sent to the General Court was for the larger concerns of all the towns.[7]

. Among the earliest things decided in Massachusetts was "that trivial things must be ended in towns."[8] "The town meetings elected such officers as were required for the management of local business and made such by-laws (town laws), as commended themselves to the judgment of the community. For the management of the affairs of the town during the interval between town meetings, a board of townsmen usually called selectmen, were elected" and other officers.

Representatives to the Colonial Legislature were also elected in town meetings. Besides electing town officers, the town meeting was a legislature for all matters of local concern. It levied the taxes; it passed by-laws relating to the use of common fields and pastures," etc.[9]

These town meetings were conspicuously well adapted for the purposes for which they were organized, and no wonder that they called forth from Mr. Jefferson the highest encomiums in their praise, and caused him to express the wish that Virginia possessed similar institutions.

But the town meeting, however well adapted to the conditions and needs of a *village population,* was entirely unsuited to meet and control a situation where "in place of the few score rustics following the accustomed lead of the parson and the squire, and asserting themselves only when their traditions of equality were ignored—in place of this small, easily managed body, there was met a heterogeneous mass of men numbering hundreds, jealous, unacquainted, and often in part bent on carrying out some secret arrangement in which private interest overrode all sense of public welfare."

In this strain, remarking upon the sad decadence which befell the "town meeting system," between the years 1840 and 1870, the writer, Charles Francis Adams, says: "The town meeting then fell to its lowest point of usefulness, as prior to 1840 it might have been seen in its most perfect form." He uses Quincy, Mass., as an exemplar of the facts he is relating and says: "The poll-lists contained the names of more than two thousand voters." "That the town meeting, as a practical method of conducting municipal affairs should break down under the stress to which a dense city population must subject it, is a matter of course." "Just in the degree in which *civic population increases,* therefore, the town meeting becomes *unwieldy* and *unreliable,* until at last it has to be laid aside as something which the community has *outgrown.* Moreover, the indications that the system is breaking down are always the same. The meetings become *numerous, noisy, and unable to dispose of business.* Disputed questions cannot be decided; *demagogues obtain control,* the *more intelligent cease to attend."* The author says further, that, "the moderator would bring up in succession the articles in the warrant. The custom of *referring to committees had fallen* into disuse and had been abandoned in 1852, as *undemocratic,* and not in accordance with what men are accustomed to designate as the *'spirit of the times.'* After 1852, accordingly, everything was disposed of in a *single day and on the spot.* Want of method may be *democratic,* but it is *not business-like.* Quincy proved no exception to the rule."[10]

Touching the same subject and of the necessity under similar conditions as above, of remedying the inefficiency of the town meeting system, Sir James Bryce, author

(6) In re Pfahler, 150 Cal. 71.

(7) The Expansion of New England, Matthews, page 38.

(8) Elliott's New England, vol. 1, page 182.

(9) The Encyc. Americana, vol. 15; title, Towns and Town Meetings. "The town meeting was a primary assembly for all the freemen." Matthews, supra.

(10) Three Episodes Mass. Hist., vol. 2, page 965 et seq.

of "The American Commonwealth."[11] makes similar observations when speaking of the necessity in such case of seeking the powers of a corporation as administered through a city government.

I have thus shown what *a town meeting was;* how admirably well adapted that system was to further, foster and effectuate the ends of *local self government; that and nothing more.* I have also shown by an indubitable witness, that Puritan of Puritans, Charles Francis Adams, how that admirable system was broken down when a great increase in civic population brought upon the scene of action, a *Tumultuous and Roaring Democracy.* I have also shown, by another witness, that, in case of such accession of numbers, refuge had to be taken in the incorporation of a city or *representative government,* as a substitute for the pure democracy aforesaid. And current history is giving numerous instances, where, owing to eternal *gab-fest, graft, bribery, "all shapes and crimes,"* refuge is now being taken and resort had to *"commission governments"* in cities; government by *a few,* with the happiest results in economy, cleanliness in administration, and absence of civic crimes.

Recurring to the system of town meeting: Whereabouts in that system do you discover any trace, symptom, or token of the existence or even imagined existence of anything like the "Initiative, Referendum, and Recall," or their exercise either as to state or local matters? Every legitimate inference and indication point with immutable finger the other way.

I call another witness: Bancroft, the historian, in his "History of the United States,[12] synopsizes the charters of the various colonies, as they existed at the time of severance from the Mother Country in 1776, and after their constitutions were formed on "the recommendations of the general congress. The work was done by the several states, in the full enjoyment of self-direction."

Of the American statesmen who assisted in framing the new governments, *not one had originally been a republican."* "From an essentially *aristocratic mold,* America took just what suited her condition and rejected the rest. The transition of the colonies into self-existing commonwealths was free from vindictive bitterness, and attended by no *violent or wide departure from the past."*

"The spirit of the age assisted the young nation to own justice as older and higher than the state, and to found the rights of the citizen on the rights of man. And yet, in the regeneration of its institutions, it was not guided by any *speculative theory.* No successors of the fifth monarchy proposed to substitute an *unwritten higher law interpreted by individual conscience, for the law of the land and the decrees of human tribunals.* The people proceeded with moderation. Their large inheritance of English liberties saved them from the necessity and the wish *to uproot their old political institutions.* Respect and affection remained for their native land from which the United States had derived *trial by jury,* the *writ for personal liberty,* the *practice* of *representative government,* and the *separation of the three great co-ordinate powers in the state."*

Only resident taxpayers could vote in any of the states except Georgia, where every "white inhabitant of any mechanic trade" also could vote. With this exception, all the colonies required of the voter a property qualification variously valued, in Massachusetts some $200.00, Georgia, 50 pounds, and so on. Quite a considerable sum of money or amount of property was required to make a man eligible for the office of governor, and in all of them to some extent, as well as for representative and senator, except in Pennsylvania.

"Massachusetts, the first to frame a government independent of the King, *deviated as little as possible* from the *letter of its charter.* A convention authorized by its people framed its constitution compiled for the most part by John Adams, guided by the 'English Constitution,' by the bill of rights of Virginia, and by the self-experience of Massachusetts."

(11) Page 43.
(12) Vol. 5, chap. 9, page 111 et seq.

New Hampshire shaped its government with the *fewest possible changes* from its *colonial form,"* and similar observations, apply to most other states. Rhode Island possessed under its charter a government so thoroughly republican in form, that rejecting monarchy merely required the renunciation of the king's name in the style of its public acts. Connecticut, in like manner, had only to substitute the people's name for that of the king. South Carolina's constitution was introduced by act of the legislature. So of Virginia. Pennsylvania's constitution was framed by its delegates; tne same with Maryland; the same with New York, New Jersey, Georgia and Delaware. North Carolina's constitution was ratified by the congress which framed it. *None of the constitutions* appear to have been *submitted to the people for adoption.* Nowhere could the governor dissolve the legislature and appeal directly to the people, and on the other hand, he could not be removed save upon impeachment and conviction. The judges were in some states appointed by the executive council, or governor, but usually by the legislature. In South Carolina, Massachusetts, and New Hampshire, they could be removed on the address of both houses, as in England.

This abridgment of the statements of Mr. Bancroft must suffice for a description of the ingredients which formed the component parts of the newly-formed states. A substantial similarity runs through all those formations.

Whereabouts in the testimony of Mr. Bancroft is found the slightest hint or intimation that those constitutions, built on "an essentially *aristocratic mold,"* framed after the pattern of the *"English Constitution,"* contained within their bosoms anything even remotely resemblant of the power now, with audacious confidence, asserted always to have lain slumbering there, to-wit: "The Initiative, Referendum, and Recall?"

I pass on now to that momentous period when the delegates were in convention assembled in 1787, to frame a constitution for the government of the United States. And at this point I call another witness, Mr. Gordy: In discussing the fourth resolution of the Virginia plan—"that the members of the first branch of the national legislature ought to be elected by the people of the several states"—Elbridge Gerry, Democratic Vice-President in Madison's second term, said: "The evils we experience *flow from an excess of democracy."* Said George Mason, an anti-federalist delegate from Virgina, who refused to sign the constitution, on account of his devotion to state sovereignty: *"We have been too democratic."* Edmond Randolph said: "Every one admits that the evils under which the United States labor have their origin in the *turbulence* and *follies of democracy."* Said Roger Sherman: "The people should have as *little to do as may be about the government.* They want information and are constantly liable to be misled."[13]

In speaking of the Senate, Madison said: *"Democratic communities* may be *unsteady* and may be led to action by the *impulse* of *the moment."* He contended, therefore, that the Senate should hold office for nine years, that it might serve as a *barrier* against *democracy."*[14] The convention "wished to provide for a government in which the *power of the people* would be *exhausted* in choosing some of the men who were to administer it and were to execute its laws."[15] So universal was the distrust of a democracy that the wish to *refine popular appointments* by successive *filtrations* (this remark was made by Madison) was *unanimous,* the only difference arising as to the extent to which this process of filtration should be carried.[16]

With this distrust and fear of the "turbulence and follies of democracy" and the inflamed passions of multitudes of men, it was but natural that the convention which framed the Constitution should be guided by a wise conservatism in establishing a bill of rights in our fundamental law, thus safeguarding that trinity of rights, life, lib-

(13) Gordy Pol. Hist. U. S., page 84.
(14) Ib. 85.
(15) Ib. 86.
(16) Ib. 87.

erty, and property, and all coincident rights, against the inflamed passions and tyrannies of a multitude. Such was the situation when that instrument was adopted in 1789, and that meaning it still bears. "The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."[17]

I shall touch on this point later on, and meanwhile discuss from various points of view.

The Recall of Judges.—Due process of law or law of the land, as Mr. Webster pointed out in Dartmouth College v. Woodward,[18] is "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

The recall business is the very ***antithesis*** of the *above.* It *condemns without hearing;* proceeds *without inquiry* and ***renders judgment without trial.***"

The Recall is an old offender. Since our green earth first swung herself into her orbit around the sun this noted charlatan on many occasions has appeared clothed in divers disguises; assuming polyglot pseudonyms, but posing always as a *patriot,* and the *simplifier, solver* of *popular contentions.*

History records that in this character it put in an appearance in ancient Greece, 484 B. C., when, with oyster shells as ballots, Aristides was banished, i. e., *ostracised,* from Athens by a popular vote, ***without charges preferred.***" The story is told that, on the day of voting, an ignorant citizen, personally unknown to the statesman, being asked why he voted against Aristides, answered: *"Because he was tired of hearing him always called 'The Just.'"*[19] Which doubtless would prove a very sensible and satisfactory answer at the present day.

Some 451 years after this, another recall occurred, and it was accomplished by means of *crucifixion.* "He who spake as never man spake," was brought before Pontius Pilate, and the Jewish populace clamored for his death. Pilate asked: *"Why, what evil hath he done?"* and the only reply was: *"Crucify Him! Crucify Him"*[20] This answer is similar in effect to that given by the citizen of Athens, concerning Aristides.

Next we find the power of recall exercised by the ***sans culottes*** of Paris by means of the ***guillotine,*** when the streets ran red with blood, and the only charge was *"Aristocrat,"* and followed immediately by the death-vote! And surely at that time, the *French people* were in the ***supreme control*** of ***their government,*** and it therefore must have been *republican,* because Mr. Justice Wilson says in Chisolm v. Georgia,[21] "My short definition of such a government—one constructed on this principle—that the supreme power resides in the body of the people." To which is added in Kiernan v. City of Portland, 72 Cent. Law Jour., p. 363, this further postulate: *"From* which *it follows* that the *converse* must be true; that is to say, any government in which the supreme power resides with the people *is republican in form."* So that from the above premises it follows as night follows day, that during the "Reign of Terror," inasmuch as the ***supreme power resided in the body of the French people,*** their government was ***republican both in principle and in form!***

Could not the same be said of a *tribe* of *savages* in whom resides the supreme power?

But the remark of Mr. Justice Wilson was wholly *obiter,* since the only point at issue was: Could a citizen of another state at that time maintain an action in the supreme court against the State of Georgia; and it was held *nem. con.,* he could. But the definition of Mr. Justice Wilson was "too short at both ends." *No* government is *republican* either on *principle* or ***in form,*** unless organized into the usual departments incident to such a government. Otherwise, the effecting of such organization would

(17) Const. Lim. 7th Ed., page 89; Campbell, J., in People v. Blodgett, 13 Mich. 127; Scott v. Sandford, 19 How. 393.
(18) 4 Wheat. 519.
(19) Int. New Ency. 793.
(20) Mark 15:14.
(21) 2 Dall. (U. S.), 419.

entail a wholly useless expense. Besides, by parity of reasoning, if Mr. Justice Wilson had stated as a *"short* definition" that *"every man is an animal,"* then with equal logic it follows that the *converse* must be *true;* that is to say: *"every animal must be a man."*

In a senatorial article, 72 Cent. Law Jour., loc. sit. 358, it is said: "Judges like all other public servants are selected because of anticipated *"good service,"* and would be recalled only for *"demonstrated bad service."*

Considering the fact that the recall of judges has never been tested by actual experience, it would seem the foregoing statement is *mere assumption.* Besides, how does the writer *designate* and *distinguish "good service"* from *"demonstrated bad service?"* Is it *"good service"* when the judge obeys the *oath* he has *taken* and *adheres* to the *constitution,* the *laws,* and *well established precedents?* If so, *why recall him?* Who is to judge of this matter? A majority of the voters of the state? Are they to qualify themselves by *studying law between the time the recall is started, and the time of voting?* Or are they to rely on the *lawyers* of the *state to advise them how to vote?* If so, *who* does the voting, the *lawyers* or the *people?* If the judge has really done *"good service"* as aforesaid, and is thereupon *recalled,* does not that *"good service"* thereby become *"demonstrated bad service?"* But if he does the *latter* kind of service, and a refusal to recall him decides it is *"good service," wherein, in either case,* do the *beneficial effects* of the *recall shine forth?* Moreover, does not this system of recall afford a terrible temptation to a judge to yield to the popular whim and decide accordingly?

The recall of judges is a *"Bill of Attainder"* and therefore *repugnant* to Sect. 10 of Art. 1, of the Constitution of the United States, and to Sect. 1 of Art. 14, of the amendments to the same—relative to "due process of law." Judge Cooley approvingly says: "Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured and guarded, in one's liberty as a man and citizen—his right *to vote,* his right to *hold office,* his right to worship God according to the dictates of his own conscience, his equality with all others who are his fellow citizens; all of these guarded and protected, and not held at the *mercy* and *discretion* of any *one man* or *any popular majority."*[22]

In State v. Julow,[23] when discussing the 30th section of the Bill of Rights of Missouri, relative to due process of law, it was said: "These terms, life, liberty, and property are representative terms and cover every right to which a member of the body politic is entitled to under the law; within their comprehensive scope are embraced the rights of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—*all* our liberties, *personal, civil,* and *political;* in short, all that makes *life worth living,* and of none of these liberties can anyone be deprived, except by due process of law. (2nd Story Const., 5th Ed., Sect. 1950.) With each of these rights under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right effectual and valuable in its most extensive sense, pass as incidents of the original grant. The rights thus guaranteed are something more than the mere rights of locomotion; the *guaranty* is *the negation of arbitrary power* in *every form which results in a deprivation of a right."* And the same considerations apply to Sect. 1 of the 14th amendment to the federal constitution relative to any state depriving any person," etc. The litigated statute, in that case, inflicted punishment on an employer who discharged an employee because of belonging to a union labor organization.[24]

In Page v. Hardin,[25] it was adjudged

(22) Citing Story's Misc. Writ. 620; People ex rel. Le Roy v. Hurlburt, 24 Mich. 44.

(23) 129 Mo. 163.

(24) See to like effect State v. Kreutzberger, 114 Wis. 530; Gillespie v. People, 188 Ill. 176. "It is the right of every individual to claim the protection of the laws, whenever he receives any injury." Marbury v. Madison, 1 Cr. 137.

(25) 8 B. Mon. 672.

that an office was a valuable right and interest. In Com. v. Jones,[26] same court, referring to a provision in the Constitution of Kentucky, which deprived any person of the right to hold office who fought a duel, said: "It is in effect to dispossess him of a right which the Supreme Court of the United States terms 'inalienable.' "[27] Mr. Justice Chase, when speaking of bills of attainder, says: "These acts were legislative judgments, and an exercise of judicial power."[28]

Judge Cooley says: "Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form."[29] Elsewhere he says: "The legislative power extends only to making of laws, and in its exercise it is limited and restrained by the paramount authority of the federal and state constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts, for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative. That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."[30]

Nor does it make any difference whether the questioned act emanates from the organic law of the state or from the legislature.[31] The state, through her fundamental law has no more power to invade and trample upon the vested rights of the citizens than has her legislature.[32]

In Stevens v. Benson,[33] it has been determined that the initiative and referendum amendment of the constitution of the state was "self-executing." The same would doubtless hold good as to the recall feature.

The subject now being discussed, was abundantly and thoroughly considered in Cummings v. Missouri.[34] Cummings was a Catholic priest, who, having failed to take the expurgatory oath required by the Constitution of Missouri, of 1865, and continuing his clerical ministrations, was, under the provisions of that organic law, indicted for "feloniously preaching the gospel." He was tried, convicted, sentenced and the judgment rendered, affirmed in the State Supreme Court and the cause removed by appeal to the Supreme Court of the United States, where Mr. Justice Field delivered the opinion of the court. He, among other things, said: "The disabilities created by the Constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri, that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' " He then said these terms *life, liberty* and *property comprehended every right known to the law.* That under liberty is included freedom from outrage on the feelings as well as restraints on the person. The deprivation of any rights, civil or political, previously enjoyed,—may be punishment. "Disqualification from office may be punishment, as in cases of conviction on impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, may also, and often has been, imposed as punishment."

Mr. Justice Field then proceeds: "The counsel for Missouri closed his argument in this case with a striking picture of the struggle for ascendency in that state during the recent rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although, it was not adopted by the people until the

(26) 10 Bush. 735.
(27) Citing Cummings v. Missouri, 4 Wall 277.
(28) 3 Dallas 386.
(29) Const. Lim. 7th Ed. 518.
(30) Ib. 132.
(31) New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Cummings v. Missouri, 4 Wall. 277; Dodge v. Woolsey, 18 How. 331.
(32) Ibid.
(33) Oregon, 1927, 91 Pac.
(34) 4 Wall. 277-332.

war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.

It was against the excited action of the states, under such influences as these, that the framers of the federal constitution intended to guard.

In Fletcher v. Peck,[35] Mr. Chief Justice Marshall, speaking of such action, uses this language:

"Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state."

"No state shall pass any bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts."

"A bill of attainder is a legislative act, which inflicts punishment without a judicial trial."

It is said in Kadderly v. Portland,[36] "the people have simply reserved to themselves a larger share of legislative power," referring to the initiative, referendum and recall. If so, then such power, must, of course, be *legislative,* which, when exercised through a vote of the people in recalling a judge, inflicts punishment upon him by disqualifying him from *longer holding his then term* of judicial office, as well as outraging his feelings by the manner of its accomplishment, as much an invasion of his liberty as though his person had been arrested, and all this too, without hearing, without inquiry, without judicial trial. This shows clearly that the act of recall, whether it emanates from the organic law or the statute law, is neither more nor less than a *"bill of attainder."*

Cooley says: "The maxims of magna charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do, cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments."[37]

One of those maxims is the non-responsibility in a civil action of a judge for his mistakes or faults of judgment, and no recovery of compensation can be had against him for any loss suffered, resulting from his action. "The policy and justice of this exemption are so plain and reasonable that the rule meets with universal assent, and is applied in all cases where functions of a judicial nature are exercised."

They who are intrusted to judge, "ought to be free from vexation that they may determine without fear; the law requires courage in judge and therefore provides security for the support of that courage." "Judges have not been invested with this privilege for their own protection merely; it is calculated for the protection of the people by insuring to them a calm, steady and impartial administration of justice."[38]

Would not this principle equally apply even to such a constitutional provision as the recall of judges? Which suspends over the head of each judge "the sword of Damocles" with an implied threat of "recall," necessarily preventing him from exercising "a calm, steady and impartial administration of justice."

I do not believe that even a *constitutional provision can wipe out and destroy a coordinate department* of a state government in this way, and still that government remain *"republican in form."*

But, accepting the definitions aforesaid,

(35) 6 Cranch 137.
(36) 44 Or. 118.

(37) Const. Lim., 7th Ed., page 244.
(38) Thus was an ancient maxim of the common law, as shown by numerous citations of authorities in Cooley on Taxation, 2nd Ed., pp. 786-787.

as to the comprehensive nature of the terms, "life, liberty and property," that "they comprehend every right known to the law," the recall will fare no better when it encounters Sect. 1, of the 14th Amendment to the Constitution of the United States, forbidding that "any state deprive any person of life, liberty or property without due process of law."

"Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law"[39] and cases cited.

Proceeding under the auspices of the authoritative basis aforesaid, if the recall represents "due process of law," then I am unable to discover any reason why a man under similar process may not be deprived of his liberty, his property, nay, of his life, upon a mere majority vote!

T. A. SHERWOOD.

Long Beach, California.

(39) Const. Lim. 518.

GARNISHMENT—SITUS OF DEBT.

SUTTON v. HEINZLE et al.

Supreme Court of Kansas, May 6, 1911.

115 Pac. 560.

A foreign corporation doing business in this state, and subject to process here, may be garnished for a debt owing to a nonresident defendant, which was incurred outside the state; and jurisdiction over the fund, as against the defendant, and as against a nonresident claimant of it, disclosed by the garnishee's answer, may be obtained by publication service upon them.

MASON, J.: William B. Sutton brought action in Wyandotte county, Kan., against Martin Heinzle, a resident of Kansas City, Mo., for an attorney's fee, serving garnishment summons upon the Metropolitan Street Railway Company, a Missouri corporation engaged in business in this state and amenable to process here. The garnishee answered, stating in effect that Heinzle had obtained a judgment against it in Missouri for $10,000 on account of a claim for personal injury; that all but $1,200 of the judgment had been paid; and that Richard J. Smith and others claimed an interest in or lien upon this balance. The plaintiff elected to take issue with the answer of the garnishee, and caused Smith and the other claimants to be made parties. Smith appeared specially and contested the jurisdiction of the court, and later the plaintiff's claim on the merits. The other defendants defaulted. The court upon oral evidence, which is not preserved in the record, found that the defendant owed the plaintiff, that the garnishee owed the defendant, and that the interpleaded defendants, including Smith, had no interest in the fund. Judgment was rendered, ordering the garnishee to pay the plaintiff's demand. Smith appeals. He did not appear at the trial. He contends that this was due to a misunderstanding on his part, and that he should on that account have been granted a new trial. This matter, however, seems to be one in which the decision of the trial court must be final.

(1) In view of this situation, the only questions on which the appellant can be heard are those arising on the pleadings, the principal one of which is whether in view of the residence of the parties and character of the debt garnished, the court acquired jurisdiction of the fund. In a note in 69 Am. St. Rep. 122, it is said: "We believe it to be a rule of law, sound in principle, and amply supported by the appended authorities, that corporations are properly subject to garnishment only in the states, either of their domiciles or of the residence of their creditors, and that a corporation, by going into another state, qualifying under its laws, transacting business there, and establishing an agent upon whom process may be served in suits against the corporation, does not thereby transfer to such other state the situs of debts which it owes to nonresidents thereof, nor subject such debts to seizure in such state under process of garnishment."

The contrary is held in the well-considered case of Baltimore & Ohio Railroad Co. v. Allen, 58 W. Va. 388, 52 S. E. 465, which fully reviews the authorities, and which is annotated in 3 L. R. A. (N. S.) 608 and 112 Am. St. Rep. 975. The question cannot be regarded as an open one in this state, having been decided in B. & M. R. R. Co. v. Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497; paragraph 3 of the syllabus, reading: "A foreign corporation coming into this state, and leasing property and doing business here, may be garnished for a debt due to one of its employees, although such employee is not a resident of this state, and although the debt was contracted outside of the state." In the opinion it was said: "A mere debt is transitory, and may be enforced wherever the debtor or his property can be found, and, if the creditor can

enforce the collection of his debt in the courts of this state, a creditor of such creditor should have equal facilities." 31 Kan. 196, 1 Pac. 625 (47 m. Rep. 497).

As the court obtained jurisdiction of the indebtedness by the service of the summons in garnishment, it could determine upon substituted service whether a nonresident claimant had any interest in the fund. Gen. Stat. 1909, § 5834 (Code Civ. Proc. § 241); 20 Cyc. 1132.

(2) If the indebtedness garnished had actually been in the form of a judgment, by the weight of authority it would not have been subject to garnishment in the courts of another state. 20 Cyc. 1010; 14 A. & E. Encycl. of L. 777; Wabash Railroad Co. v. Tourville, 179 U. S. 322, 21 Sup. Ct. 113, 45 Am. Rep. 210. But the plaintiff claimed, and the court must be deemed to have found upon sufficient evidence, that, after Heinzle's claim against the railway company had been reduced to judgment, a part of the amount was paid and the balance satisfied; the creditor thereafter looking to the company to pay the difference, thus converting it into an ordinary contract debt.

The appellant seeks to question the sufficiency of the plaintiff's petition, and the regularity of the garnishment proceedings. Ordinarily these are not matters upon which an interpleaded claimant of a garnished fund can be heard. 20 Cyc. 1135; 14 A. & E. Encycl. of L. 910. This general rule may be changed by our statute, which provides that the garnishee may defend the principal action, and that a claimant of the fund upon being made a party, may in his answer set forth any defense which the garnishee might have made. Gen. Stat. 1909, §§ 5831, 5834 (Code Civ. Proc. §§ 238, 241). We find no substantial defect in the garnishment proceedings. The appellant filed a motion to make the plaintiff's petition more definite and certain, a demurrer, and an answer. The motion merely appealed to the discretion of the court.

(3) The only serious question raised by the demurrer grows out of the fact that the plaintiff's action was for services rendered as an attorney in prosecuting the claim of a minor for compensation for personal injuries—the claim upon which the judgment was rendered against the railway company. Martin Heinzle acted as the next friend of the minor, and the minor was joined with him as a defendant in this action. The appellant's contention is that the plaintiff's contract with the minor, or with the next friend for the minor, was void. Whether or not an express contract as to the attorney's compensation was enforceable according to its terms, the services having been rendered and having been beneficial to the minor, a liability exists to pay for them on the ground that they are classed as "necessaries." 3 A. & E. Encycl. of L. 416, 417; 5 Am. & Eng. Ann. Cas. 131, note; 96 Am. St. Rep. 731, note. As already stated, the questions arising upon the trial of the issues raised by the answer are not so presented as to be reviewable.

The judgment is affirmed. All the Justices concurring.

NOTE.—*Jurisdiction in Garnishment of Foreign Corporation of Debt Due by a Non-Resident to a Non-Resident.*—The *situs* of a debt for purposes of garnishment has been the subject of various and conflicting decision, and it may be said, that, so far as the validity of a judgment under the faith and credit clause of the constitution is concerned, the issue has been reduced to a very narrow question.

The case of Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, established the principle that a debt in favor of a non-resident creditor, served only by publication, may be garnished at the residence of his debtor, his debtor in the case happening to be a corporation at the home of its charter, at least in a case where the debt is payable generally.

Here, however, it is not proposed to speak of the distinction suggested between debts payable generally and those made expressly payable at a certain place.

That distinction has been applied in a number of cases, of which we cite only one, that of Bullard v. Chaffee, 61 Neb. 83, 84 N. W. 604, 51 L. R. A. 715.

Following after the Sturm case came that of Harris v. Balk, 198 U. S. 215, 49 L. Ed. 1023. This case held that where a citizen of a state was indebted to another citizen of the same state, the former, while temporarily in another state, could be there garnished at the suit of his creditor's creditor.

Justice Peckham delivered the opinion, from which there was dissent by Justices Harlan and Day, with, however, no dissenting opinion.

Justice Peckham stated the contention against jurisdiction as follows: "The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation, because the garnishee, although at the time in the State of Maryland and personally served with process therein, was a non-resident of that state, only casually or temporarily within its boundaries; that the *situs* of the debt due from Harris, the garnishee, to the defendant in error herein was in North Carolina and did not accompany Harris to Maryland; that, consequently, Harris, though within the State of Maryland, had not possession of any property of Balk, and the Maryland State Court, therefore, obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of judgment was immaterial."

The adverse contention was stated to be that "though the garnishee were but temporarily in Maryland, yet the laws of that state provide for an attachment of this nature, if the debtor, the garnishee, is found in the state and the court obtains jurisdiction over him by the service of process therein; that the judgment, condemning

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the debt from Harris to Balk was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland."

The latter contention was held to be the correct one:

The justice said: "We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. Blackstone v. Miller, 188 U. S. 189, 206. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the *situs* of the debt was originally."

This case puts out of view *situs* as the test of jurisdiction and makes as conclusive that of suability of the garnishee by his creditor at the place of garnishment. Does this holding foreclose this question as to a foreign corporation garnishee, though it be subject generally to suit by the corporation's creditors?

In the first place the distinction, observable between a corporation doing business abroad and a debtor temporarily abroad, is that its suability away from home depends in no way upon the debt being payable generally and suit against it might even be forbidden in the place it is doing business, though the debt were expressly there made payable. In the second place, the corporation does not really go abroad, but it submits itself to jurisdiction by stipulation based upon a valid consideration.

Were such a submission purely voluntary, there would be some question of such an act being *intra vires*.

Therefore it is to be said, that, when one's debtor is an individual and his debt is payable generally, it is within the contemplation of debtor and creditor that the right of pursuit by the latter is wherever the former may be found.

In R. R. Co. v. Koontz, 101 U. S. 11, Justice Field said: "The question of suability and jurisdiction is not so much one of citizenship as of 'finding.'" By "finding" he meant "finding" within the purview of suability—being in the place of suit in consequence of voluntary locomotion or there to abide. Taking one to another state by force or fraud prevents his being "found" there for civil jurisdictional purposes as has been frequently held. The principle, therefore, is a general one only.

In the Sturm case, Justice McKenna said, in answer to a contention that "a debt cannot be made migratory by the debtor," that the corporation "was an Iowa corporation and a resident of the state, and was such at the time the debt sued on was contracted."

In the case of an individual it must be his act alone that makes a debt "migratory," because fraud or force cannot thus act, and, if his voluntary act is sufficient, nothing else needs be considered. Besides, the test is voluntary presence abroad, and he cannot will its effect to be otherwise.

A corporation, however, must act in conjunction with another—the state in which it acts by a sort of agency under its charter powers—to submit to whatsoever kind of jurisdiction is agreed on.

An individual or a partnership cannot necessarily subject himself or itself to an action *in personam* by business operations in another state, nor perhaps may it be in the power of the state to exact that he or it should.

Therefore the jurisdiction as to a debt owing by a corporation away from its home is purely conventional under statutes.

Can this duplicate jurisdiction in garnishment? May the statute have extraterritorial jurisdiction and call the doing of business the equivalent of an individual's presence therein?

That a non-resident creditor may there sue is a privilege he may not desire even, still less if it has a condition attached to it.

In Baltimore & O. R. Co. v. Allen, *supra*, the opinion does not discuss the distinction we have been endeavoring to point out. It attempts to distinguish a former ruling of the West Virginia Supreme Court of Appeals in Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

It says: "The garnishee in that case was only temporarily or casually in the state. It had an agent here for a special purpose. Its situation was analagous to that of a non-resident individual temporarily or casually in the state, having no usual place of abode at which service could be made in his physical absence therefrom. Here the case is radically different. The corporation actually operates its road through the state, having agents along its line permanently, upon whom service may be had at any time, owning property of immense value and carrying on a business of vast proportions, in view of which the statute contains special provisions, applicable to such foreign corporations."

This illustrates forcibly our position that the jurisdiction is purely conventional and the creditor of the corporation has never been asked to consent to it, though the corporation impliedly consents for itself.

In some states a state officer is made the agent of a corporation to accept service. Does not that mean that so far as demands against a corporation are concerned? Why should a state attempt anything further? For further discussion of this subject see 50 Cent. L. J. 105.

C.

HUMOR OF THE LAW.

James Creelman, at a dinner in New York, said of an opponent of civil service:

"If this man had his way, he would render our civil service boards as futile as the career of Tom Slack.

"Tom Slack was a lawyer; but I doubt if he had a case a year. One hot afternoon he decided to take a breezy ferry ride, so he put on his door:

"'Back in two hours.'

"On his return he found that someone had written underneath:

"'What for?'"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Action**—Suit in Equity.—An action begun in equity may, by subsequent pleadings, be changed to an action at law subject to jury trial.—Hart v. Village of Wyndmere, N. D., 131 N. W. 271.

2. **Adverse Possession—Improvements.**—Adverse possession may be shown by making improvements on the premises.—Merritt v. Westerman, Mich., 131 N. W. 66.

3.——Public Property.—In the absence of statute, no title can be acquired against the public by user alone, nor lost to the public by nonuser.—Town of Shelby v. Cleveland Mill & Power Co., N. C., 71 S. E. 218.

4. **Affidavits**—Foreign Officer.—An affidavit made in a foreign state before a notary public, with his seal attached, is receivable in evidence in Georgia without further authentication.—Singletary v. Watson, Ga., 71 S. E. 162.

5. **Arbitration and Award**—Rule of Court.—At common law courts had no power to make an agreement to arbitrate a rule of court, unless there was a suit pending with reference to the dispute.—Key v. Norrod, Tenn., 136 S. W. 991.

6. **Assault and Battery**—Peremptory Instruction.—A request to charge that, if plaintiff's injury and suffering were feigned, he was not entitled to recover held properly refused, as requiring a verdict for defendant, though plaintiff was entitled to nominal damages for an unjustifiable assault.—Sumner v. Kinney, Tex., 136 S. W. 1192.

7. **Assignments**—Order to Pay Money.—An order by a debtor, directing a servant to pay money in his hands to creditors, held not an equitable or legal assignment.—Loughlin v. Larson, S. D., 131 N. W. 304.

8. **Attachment**—Affidavit.—An affidavit for an attachment must state facts from which a conclusion in the language of the statute would necessarily be drawn.—Weil v. Quam, N. D., 131 N. W. 244.

9. **Attorney and Client**—Contingent Fee.—An agreement for contingent fees amounts to an assignment of a portion of the judgment sought to be recovered.—Dreiband v. Candler, Mich., 131 N. W. 129.

10. **Banks and Banking**—Collection of Draft.—For a bank, with which a draft is deposited for collection, to immediately, on notice of the receipt of the draft by the bank to which it is forwarded, enter the amount of the draft to the depositors' account, is an advancement or loan, for which they are liable; the draft, through no negligence, however, not being collected.—Farmers' Nat. Bank of Center v. Merchants' Nat. Bank of Houston, Tex., 136 S. W. 1120.

11. **Bills and Notes**—Bona-Fide Purchaser.—That a purchaser of notes knows of a collateral agreement upon which the notes are given, but does not inquire whether it has been, or will be, performed, held not to affect his character as a bona-fide purchaser.—Hakes v. Thayer Mich., 131 N. W. 174.

12.——Consideration.—A valuable consideration moving from the maker of a note to a third person held to support the obligation in favor of the payee.—Harrison v. State Bank of Monticello, Ind., 94 N. E. 1020.

13.——Indorser.—A payee, writing his name on the face of a note under the maker's signature, held liable as an indorser.—First Nat. Bank of Etowah, Tenn., v. Messer, Ga., 71 S. E. 148.

14.——Waiver Clause.—A provision of waiver inserted in the body of a note is a part of the contract of the maker and indorser.—Owensboro Savings Bank & Trust Co.'s Receiver v. Haynes, Ky., 136 S. W. 1004.

15. **Brokers**—Compensation.—An owner employing a broker to procure a purchaser held not entitled to defeat the broker's right to compensation by selling to the purchaser through another.—Shelton v. Cain, Tex., 136 S. W. 1155.

16.——Specific Performance.—A broker is not entitled to commissions for a sale unless the contract procured by him is capable of specific performance at the suit by the vendor; a right to recover damages against the purchaser being insufficient.—Webb v. Durrett, Tex., 136 S. W. 1189.

17. **Carriers**—Commerce Commissioners.—Courts are without jurisdiction to determine the reasonableness of a tariff published and filed with the Interstate Commerce Commission, as required by Hepburn Act of June 29, 1906, unless redress be invoked primarily through the Commission.—L. Starks Co. v. Grand Rapids & I. Ry. Co., Mich., 131 N. W. 143.

18.——Divided Responsibility.—Where royalty oil is delivered with the whole of the oil in the pipe line of a common carrier of oil, the carrier must account to the lessor for his undivided fraction.—Smith v. Linden Oil Co., W. Va., 71 S. E. 167.

19.——Reasonable Rule.—The reasonableness of a railway company's regulation restricting

the right of passengers to carriage on certain trains is for the court.—Doherty v. Northern Pac. Ry. Co., Mont., 115 Pac. 401.

20.——Special Contract.—Passengers who stopped over, contrary to the provisions of a special contract of passage, cannot complain they were ejected from another train on refusing to pay regular fare.—Sanden v. Northern Pac. Ry. Co., Mont., 115 Pac. 408.

21. **Certiorari**—Right to.—Certiorari does not lie where there is any plain, speedy, and adequate remedy at law.—Schafer v. District Court of Nelson County, N. D., 131 N. W. 240.

22. **Charities**—Devise.—A bequest of money for a hospital held subject to a certain precedent that county commissioners should contract to forever support and maintain the same, and, they having no such authority, the bequest was void.—Robbins v. Hoover, Colo., 115 Pac. 526.

23. **Conspiracy**—Overt Act.—A conspiracy which results in no unlawful act held to constitute no basis for damages.—Jackson v. Morgan., Ind., 94 N. E. 1021.

24. **Constitutional Law**—Delegation of Power.—Legislative power was not unconstitutionally delegated to the Secretary of Agriculture by provisions of forest reserve act.—United States v. Grimaud, 31 Sup. Ct. 480.

25.——Personal Privacy.—Property in photograph taken after Laws N. Y. 1903, c. 132, went into effect, held not taken without due process of law by provisions of statute making it a misdemeanor to use the portrait of a live person for advertising purposes without consent.—Sperry v. Hutchinson Co. v. Rhodes, 31 Sup. Ct. 490.

26.——Police Power.—The power of the state to protect the health, morals, and safety of the public held not to be burdened with the condition that the state must compensate individuals sustaining pecuniary losses thereby.—Town of Shelby v. Cleveland Mill & Power Co., N. C., 71 S. E. 218.

27. **Contracts**—Agency.—A person who sends a telegram directing his broker to purchase stock held to make the telegraph company his agent.—Sherrerd v. Western Union Telegraph Co., Wis., 131 N. W. 341.

28.——Condition Subsequent.—To constitute a condition subsequent on which a forfeiture may be declared because of a failure of its performance, the condition must be created by express terms or by clear implication.—South Texas Telephone Co. v. Huntington, Tex., 136 S. W. 1053.

29.——Failure of Performance.—That it became difficult for plaintiff to secure money to advance to defendant to enable him to perform a construction contract on account of the stringency of the money market would not excuse plaintiff's failure to advance the money as agreed.—Pratt v. McCoy, La., 45 So. 1012.

30.——Forfeiture.—No steps having been taken to forfeit a contract for default in payments, the contract was subject to specific performance by the vendee's heirs.—Zirkle v. Ball, Ala., 54 So. 1000.

31.——Interpretation.—All papers constituting or tending to constitute a written agreement must be read together as one.—Baird v. Erie R. Co., 129 N. Y. Supp. 329.

32.——Tender.—Where a party to a contract avows his intention not to perform the contract, it is not necessary for the other party to tender performance in order to place him in default.—Graham v. C. L. Chapman Cream Separator Works, 129 N. Y. Supp. 323.

33.——Third Person.—A stranger to a contract, belonging to a class for whose benefit a promise by one of the parties to the contract was made, held to have an equitable right to enforce such promise.—Gaffney v. Sederberg, Minn., 131 N. W. 333.

34.——Liability.—A contract price is recoverable only on the theory of performance, and never on the theory of inability to perform.—International Text-Book Co. v. Jones, Mich., 131 N. W. 98.

35.——Mutuality.—To be valid, a contract must be mutually enforceable.—City of New York v. Paoli, N. Y., 94 N. E. 1077.

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